

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)	No. C-08-0735 SC
<u>ex rel.</u> EDMUND G. BROWN, ATTORNEY)	
GENERAL OF THE STATE OF CALIFORNIA,)	
)	ORDER GRANTING
Plaintiff,)	PLAINTIFF'S MOTION TO
)	COMPEL PRODUCTION OF
)	<u>VAUGHN INDEX</u>
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Defendant.)	
)	
)	

I. INTRODUCTION

Before the Court is a motion by the People of the State of California by and through Edmund G. Brown, Attorney General of the State of California ("Plaintiff" or "California"), to compel Defendant Environmental Protection Agency ("EPA") to produce a "Vaughn index."¹ See Docket No. 5. The EPA filed an Opposition, and Plaintiff filed a Reply. Docket Nos. 9, 12. For the reasons set forth below, the Court GRANTS Plaintiff's motion.

II. BACKGROUND

In December 2005, California sought to adopt strict emissions standards for new motor vehicles. To that end, the California Air

¹See Vaughn v. Rosen, 484 F.2d 820, 826-828 (D.C. Cir. 1973).

1 Resources Board requested from the EPA a waiver of preemption
2 under section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b).
3 The EPA took no action for two years, and then, in December 2007,
4 rejected California's request for a waiver.

5 Following the EPA's denial of waiver, Plaintiff sent the EPA
6 a request for records under the Freedom of Information Act, 5
7 U.S.C. § 552, as amended ("FOIA"). Plaintiff sought disclosure of
8 records relating to the waiver denial, including the following
9 materials:

10 communications within and outside the federal
11 government related to the waiver request,
12 drafts of the decision document, analyses
13 comparing emission reductions, fuel savings,
14 or fuel economy increases that could result
15 from implementation of the GHG Regulations to
16 those that could result from implementation of
17 federal legislation, and briefing materials
18 related to the waiver request that were
19 prepared for the Administrator or senior staff
20 of the EPA, including, but not limited to, the
21 PowerPoint presentation referenced in the
22 December 20, 2007 Washington Post article
23 entitled "EPA Chief Denies Calif. Limit on
24 Auto Emissions."

25 Compl., Docket No. 1, ¶ 7 and Ex. B.

26 Receiving no response to the FOIA request, Plaintiff brought
27 this suit against the EPA on January 31, 2008. Plaintiff then
28 filed this motion to compel the production of a Vaughn index,
asking the Court to require the EPA to produce the index within 14
days of the Court's ruling. The EPA initially took the position
that it should not have to produce the Vaughn index until it filed
a dispositive motion. After the Court took the motion under
submission, however, the EPA began producing documents in response
to Plaintiff's FOIA request. The EPA has provided Plaintiff with

1 a "sample" Vaughn index, which it claims includes descriptions of
2 approximately one tenth of the documents withheld.

3 Based on its production of the sample Vaughn index, the EPA
4 now claims this motion is moot and the Court should set a briefing
5 schedule for summary judgment. Plaintiff contends that the sample
6 index is inadequate under Ninth Circuit law, and that the Court
7 should order the EPA to produce a complete Vaughn index and allow
8 Plaintiff time to review that index before setting a briefing
9 schedule.

10 11 **III. DISCUSSION**

12 Government agencies are required, upon receipt of a proper
13 FOIA request, to make their records available to the public. See
14 5 U.S.C. § 552(a). Documents, or portions of documents, may be
15 withheld by an agency only if they fall under one of several
16 exceptions contained in FOIA. Id. § 552(b)(1)-(9). Once the
17 agency receives a FOIA request, it must make a determination
18 whether or not to comply with the request within 20 days, and must
19 immediately notify the requesting party of that determination.
20 Id. § 552(a)(6)(A)(i). When a FOIA dispute proceeds to litigation
21 and the agency claims that the statutory exemptions to disclosure
22 are applicable, it must provide the requesting party and the court
23 with descriptions of the withheld records and an explanation of
24 why those records are exempt. See Vaughn v. Rosen, 484 F.2d 820,
25 826-828 (D.C. Cir. 1973). This has come to be known as a "Vaughn

1 index."²

2 The question now before the Court is the level of detail
3 required in the Vaughn index. The EPA claims that its sample
4 list, containing descriptions of roughly 10 percent of the
5 withheld documents and the claimed exemptions, is adequate.
6 Plaintiff disagrees, and demands a complete index. The Court
7 agrees with Plaintiff.

8 A sampling of the EPA's withheld records would be of limited
9 value to Plaintiff and to the Court.

10 [T]he purpose of the index is not to merely
11 inform the requester of the agency's
12 conclusion that a particular document is
13 exempt from disclosure under one or more of
14 the statutory exemptions, but to afford the
15 requester an opportunity to intelligently
16 advocate the release of the withheld documents
17 and to afford the court an opportunity to
18 intelligently judge the contest.

15 Wiener v. Fed. Bureau of Investigation, 943 F.2d 972, 979 (9th
16 Cir. 1991); see also Fiduccia v. U.S. Dep't of Justice, 185 F.3d
17 1035, 1043 (9th Cir. 1999).

18 That a Vaughn index should include explanations for every
19 withheld document is clear based on Ninth Circuit precedent,
20 including those cases cited by the EPA. See Schiffer v. Fed.
21 Bureau of Investigation, 78 F.3d 1405, 1408 (9th Cir. 1996) (a
22

23 ²The EPA correctly notes that FOIA does not require a Vaughn
24 index. However, "[w]hen an agency denies a request, the agency
25 bears the burden of justifying its denial" Fiduccia v.
26 U.S. Dep't of Justice, 185 F.3d 1035, 1042 (9th Cir. 1999). A
27 Vaughn index is the common means of satisfying this burden, and is
28 likely the best method where more than a few records are involved.
As the EPA has agreed to produce a Vaughn index in one form or
another, and has not suggested a more appropriate means of meeting
this burden, the Court need not consider alternatives.

Vaughn index "identifies each document withheld, the statutory exemption claimed, and an explanation of how disclosure would damage the interest protected" (emphasis added)); Wiener, 943 F.3d at 978-79 (rejecting Vaughn index where the FBI grouped documents into categories "without identifying specific the specific reason or reasons for withholding each particular document" (emphasis added)); Fiduccia, 185 F.3d at 1043 (Vaughn index is a means of meeting the agency's statutory requirement to provide "enough information, presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what has not been produced and why, and the court can decide whether the exemptions claimed justify the nondisclosure").

Although precedent in this Circuit is clear, the EPA points to cases from the D.C. Circuit to support its use of a sample index. While that circuit did not explicitly define what should be included in the index in Vaughn, it has since done so, leaving little room for the EPA's position here:

A withholding agency must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information. This requirement, if indeed not explicit in Vaughn, is unmistakably implicit in the principles supporting our decision in that case, as our subsequent decisions have made very clear. When, in Vaughn, we first insisted that agencies tender an index and affidavits as a precondition to review of exemptions claims, we emphasized the necessity of identifying which exemption was relied upon for each item withheld. In Mead Data Central v. United States Department of the Air Force [566 F.2d 242 (D.C. Cir. 1977)], we elaborated on Vaughn's requirements, explaining that the withholding agency must supply "a relatively detailed justification, specifically

1 identifying the reasons why a particular
2 exemption is relevant and correlating those
3 claims with the particular part of a withheld
4 document to which they apply." As we
5 subsequently reiterated in Dellums v. Powell
6 [642 F.2d 1351, 1355 (D.C. Cir. 1980)],
7 Vaughn's call for specificity imposes on the
8 agency the burden of demonstrating
9 applicability of the exemptions invoked as to
10 each document or segment withheld. Elsewhere
11 we have defined the Vaughn index as
12 "consist[ing] of one document that adequately
13 describes each withheld record or deletion and
14 sets forth the exemption claimed and why that
15 exemption is relevant." Categorical
16 description of redacted material coupled with
17 categorical indication of anticipated
18 consequences of disclosure is clearly
19 inadequate.

20 King v. U.S. Dep't of Justice, 830 F.2d 210, 223-24 (D.C. Cir.
21 1987) (emphasis in original) (footnotes omitted).

22 The specific authorities on which the EPA relies to support
23 its use of a sample index are not applicable. In Meeropol v.
24 Meese, 790 F.2d 942, 958 (D.C. Cir. 1986), the sampling was done
25 by the court, for in camera review, rather than by the agency for
26 a Vaughn index. The Meeropol court relied on Weisberg v. United
27 States Department of Justice, 745 F.2d 1476 (D.C. Cir. 1976), but
28 in Weisberg, the court only held that sampling for a Vaughn index
was appropriate where "the number of documents is excessive and it
would not realistically be possible to review each and every one."
Id. at 1490. The EPA has not argued, let alone established, that
the volume of records in the instant matter warrants a departure
from the more detailed index required by the majority of cases.

The only remaining issue is when the EPA should be required
to produce the Vaughn index. The EPA argues that it is
inappropriate to require the index prior to filing of a

dispositive motion. Plaintiff would prefer to receive and review the index prior to beginning summary judgment briefing. It appears that there is no actual rule in this regard, as demonstrated in part by the parties' conflicting authority. Compare Stimac v. U.S. Dep't of Justice, 620 F. Supp. 212, 213 (D.D.C. 1985) ("the preparation of a Vaughn Index would be premature before the filing of dispositive motions") with Providence Journal Co. v. U.S. Dep't of the Army, 769 F. Supp. 67, 68-69 (D.R.I. 1991) (rejecting Stimac and noting, "I find defendant's argument that this Court should wait until it files a dispositive motion insufficient and sterile").

The same parties raised the same issue recently in another dispute in this district. See California ex rel. Brown v. Env'tl. Prot. Agency, No. 07-2055, 2007 U.S. Dist. LEXIS 66036, at *5-6 (N.D. Cal. Aug. 27, 2007). The Court agrees with Judge White's conclusion in that matter. Given the amount of time that has passed between the original FOIA request and the instant motion, as well as the purpose of the index, it is more appropriate for the EPA to produce the Vaughn index now and allow Plaintiff to review it prior to summary judgment. See id.

IV. CONCLUSION

For the reasons described above, the Court GRANTS Plaintiff's Motion to Compel the Production of a Vaughn Index. The Court therefore ORDERS as follows:

1. The EPA shall produce to Plaintiff no later than 20 days from the date of this order a Vaughn index addressing

every document or portion of a document withheld in response to Plaintiff's FOIA request.

2. The parties shall appear before the Court for a Status Conference on Friday, November 14, 2008, at 10:00 am in Courtroom 1.

IT IS SO ORDERED.

Dated: August 1, 2008



UNITED STATES DISTRICT JUDGE